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No. 141

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

THE FINN EQUIPMENT COMPANY,
Petitioner,

vs.

JOHN TRACY,
Respondent.

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals for the Sixth Circuit.**

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I.

### STATEMENT OF THE CASE.

In its Petition for Writ of Certiorari, The Finn Equipment Company seeks to have this Court review a decision of the United States Court of Appeals for the Sixth Circuit, wherein it ordered a reinstatement of a general jury

verdict in favor of the respondent, John Tracy (pp. A-50-A-55 of Petition). The original action involved a damage suit wherein federal jurisdiction was conferred by reason of diversity of citizenship. **28 U. S. C., Section 1332.** The facts, briefly, are these:

On September 10, 1958, John Tracy, a laborer, employed by Meadowbrook Nurseries, Inc., of Englewood, New Jersey, while working for his employer in the State of New York, sustained a traumatic amputation of his left hand and forearm while operating a mulching machine. The machine was designed, manufactured, sold and delivered to Tracy's employer by petitioner, The Finn Equipment Company. The sale of the mulching machine was consummated in the State of Ohio.

The Finn Equipment Company is an Ohio corporation, with a principal place of business in Knoxville, Tennessee, where the original action was brought and the jury verdict rendered.

The action brought by John Tracy in the District Court was submitted to the jury on two theories: (1) The negligence of The Finn Equipment Company in the design and manufacture of the mulching machine, in that it contained a hidden or concealed danger which could not be discovered in the the exercise of ordinary care, as a proximate result of which John Tracy was injured (App. p. B-1), and (2) Breach of an implied warranty. The jury returned a general verdict in favor of John Tracy which simply stated that the jury found for the plaintiff and fixed his damages at $65,000 (App. p. B-2). Neither party requested a special verdict or submitted interrogatories.

The Finn Equipment Company filed a motion for judgment notwithstanding the verdict, or, in the alternative,

for a new trial (pp. A13-A23 of Petition). The District Judge, in ruling upon the motion, concluded that Tracy's claim for relief based upon negligence was properly submitted to the jury and was supported by substantial evidence. The District Judge was of the opinion, however, that he was in error in submitting the warranty count to the jury. Accordingly, the District Judge set aside the jury's general verdict in favor of Tracy and granted to Finn a new trial (pp. A23-A29 of Petition).

Thereupon, Tracy filed a motion asking the District Court to set aside its order granting a new trial, or in the alternative, that the order be modified to permit an application to the United States Court of Appeals for the Sixth Circuit for an interlocutory appeal pursuant to Section 1292 (b), Title 28, U. S. C. The District Court declined to set aside its order granting a new trial, but did modify its order to make possible an application for an interlocutory appeal (pp. A29-A30 of Petition).

An application for an interlocutory appeal was made, granted, and perfected to the United States Court of Appeals for the Sixth Circuit (pp. A30-A31 of Petition). To avoid a possible procedural hiatus, Tracy also perfected an appeal pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure (pp. A48-A49 of Petition).

In a carefully reasoned opinion reviewing the applicable Tennessee law, the United States Court of Appeals for the Sixth Circuit held that the general jury verdict for Tracy should be reinstated (pp. A50-A55 of Petition).

The Finn Equipment Company seeks by its Petition to have this Court review the action of the United States Court of Appeals for the Sixth Circuit.

II.

## REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

A. There is no affirmative showing of prejudice to The Finn Equipment Company by reason of any alleged error by the District Court in submitting the warranty count of Tracy's complaint to the jury.

B. The decision of the United States Court of Appeals for the Sixth Circuit in the case at bar is not in conflict with decisions of the other Circuit Courts of Appeals.

C. The Tennessee General Verdict Statute (**Tennessee Code Annotated**, Section 20-1317), which the United States Court of Appeals for the Sixth Circuit held to be applicable in this diversity litigation, is in nowise unconstitutional.

III.

## BRIEF AND ARGUMENT.

### A. There Is No Affirmative Showing of Prejudice to The Finn Equipment Company by Reason of Any Alleged Error by the District Court in Submitting the Warranty Count of Tracy's Complaint to the Jury.

The Court of Appeals, in its opinion, found that the petitioner was in no way prejudiced by the submission to the jury of the warranty count of the complaint because, in the words of the Court:

> "The evidence that applied to the improper count was the same as that in support of the negligence contention, and prejudice is wanting."

The correctness of the Court's decision can be illustrated briefly as follows:

Both of Tracy's claims for relief required a finding by the jury that the mulching machine contained a hidden danger or defect and a further finding that Tracy was free from contributory negligence. As previously observed, claims for relief founded upon an implied warranty or merchantability and fitness, and upon negligence, were submitted to the jury. It is quite evident that the jury's general verdict was founded upon one of the following alternatives: Either the jury found for John Tracy on the negligence count, on the warranty claim, or on both. A closer analysis, however, will conclusively demonstrate that the jury must, of necessity, have found for Tracy on his negligence claim. If such a conclusion is made to appear, then any alleged error committed by the District Judge in submitting the warranty claim to the jury must

be disregarded, because it would not have affected the substantial rights of the parties. **(Rule 61 of the Federal Rules of Civil Procedure.)**

The District Court expressly ruled that the law of Ohio controlled Tracy's claim for relief based upon breach of implied warranty, and Tracy specifically predicated his claim upon the decision of the Ohio Court in **Di Vello v. Gardner Machine Co.**, 102 N. E. 2d 289, 293, in which the Court stated:

> ". . . this court is of the opinion that the sale of the grinding wheel carried with it an implied warranty of merchantability and fit (sic) for the usages designed and that such warranty extended to the workman of the vendee who was injured in its ordinary use because of a **latent defect,** and **in the absence of contributory negligence** such workman could recover on the basis of a breach of warranty against the party who sold the wheel to his employer." (Emphasis supplied.)

John Tracy has always acknowledged that his principal burdens, both under the negligence count (**Campo v. Scofield,** 301 N. Y. 468, 95 N. E. 2d 802 (1950)), and the warranty count, was to establish that the machine contained a hidden danger or latent defect, that The Finn Equipment Company failed to guard against hidden defects and failed to give notice of concealed dangers, and that he, John Tracy, was free from contributory negligence. It thus appears that the warranty and negligence counts or claims for relief contain identical, essential, fact burdens, and the **same** evidence supported both.

The warranty claim, however, contained an additional element, *i. e.*, the problem of privity of contract. This element, however, is a question of law. Therefore, if the

jury did find for John Tracy on the breach of warranty claim, we are nevertheless irresistibly compelled to the conclusion that the verdict also rested upon the negligence claim, because both claims have the same fact premises.

If the District Court did, in fact, err in submitting the warranty count to the jury, the error was not prejudicial and could not have affected the general verdict. The evidence which supported the warranty count fully supported the negligence count. The evidence in support of both of Tracy's claims for relief was **identical**. Therefore, since it does not affirmatively appear that any alleged error in submitting the warranty count to the jury affected the general verdict, prejudice to the Petitioner is wanting, and under the doctrine of substantial justice and harmless error, the Court of Appeals correctly ordered a reinstatement of the general jury verdict for the respondent, John Tracy.

### B. The Decision of the United States Court of Appeals for the Sixth Circuit in the Case at Bar Is Not in Conflict With Decisions of the Other Circuit Courts of Appeals.

On Pages 14, 15, and 16 of its Petition, The Finn Equipment Company insists that the decision of the Court of Appeals for the Sixth Circuit in the case at bar is in conflict with the decisions of Court of Appeals for other Circuits. The short, but respectful, answer to this insistence is readily apparent In **none** of the cases cited by Finn in its Petition on Pages 14, 15, and 16, were the other Courts of Appeals considering the law of the State of Tennessee, and, more specifically, the Tennessee General Verdict Statute (T. C. A. 20-1317). In **not one** of the cited cases was a general verdict statute such as the one in question presented for appellate consideration. The Petition filed by

Finn presents cases not in point, in that **none** of them construe or apply the Tennessee statute in question. Tracy relies upon, and would respectfully invite this Court's attention to, certain prior reported decisions of the United States Court of Appeals for the Sixth Circuit, wherein it favorably considered the Tennessee General Verdict Statute (T. C. A. 20-1317). See **Louisville & Nashville R. R. Co. v. Rochelle**, 252 F. 2d 730 (1958); **Atlantic Coastline R. Co. v. Smith**, 264 F. 2d 428 (1959).

Inasmuch as the decision of the Court of Appeals for the Sixth Circuit involved the application of a specific Tennessee statute (T. C. A. 20-1317), its decision in the premises obviously **cannot** be in conflict with the decisions of the Courts of Appeals for other Circuits.

C. **The Tennessee General Verdict Statute (Tennessee Code Annotated, Section 20-1317), Which the United States Court of Appeals for the Sixth Circuit Held to Be Applicable in This Diversity Litigation, Is in Nowise Unconstitutional.**

The Tennessee General Verdict Statute (T. C. A. 20-1317) is derivative of an act of the Tennessee General Assembly of 1801. Since its enactment, it has been applied and followed by the courts on innumerable occasions, during which time its constitutionality has **never** been challenged. See for example, **Anderson v. Read**, 2 Tenn. 205 (1812); **Pursell v. Archer**, 7 Tenn. 317 (1824); **Tennessee Central Railway Co., v. Umenstetter**, 155 Tenn. 235 (1927); **Redding v. Hatcher**, 14 Tenn. App. 561 (1932); **Wesco Paving Co. v. Nash**, 35 Tenn. App. 409, 245 S. W. 2d 782 (1951).

It long has been recognized that the Seventh Amendment to the United States Constitution was never in-

tended to preserve every facet of form and procedure incident to a jury trial as under the English common law; but rather was intended to protect the right of litigants to have fact issues determined by the jury, and legal issues determined by the court. **Walker v. New Mexico & S. P. R. Co.**, 165 U. S. 593, 17 S. Ct. 421, 41 L. Ed. 837 (1897); **Matter of Walter Peterson**, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1920).

In conformity both with its prior decisions involving Tennessee litigation [**Louisville & Nashville R. R. Co. v. Rochelle**, 252 F. 2d 730 (1958); **Atlantic Coastline R. Co. v. Smith**, 264 F. 2d 428 (1959)], and with the general rule of law announced by this Court in the case of **Byrd v. Blue Ridge Electric Co-op, Inc.**, 356 U. S. 525, 78 S. Ct. 893, 2 L. Ed. 953 (1958), the United States Court of Appeals for the Sixth Circuit held, in the case at bar, that the Tennessee General Verdict Statute (Tennessee Code Annotated, Section 20-1317) is applicable in diversity litigation in the federal district courts in the State of Tennessee.

John Tracy, therefore, respectfully submits that the Tennessee General Verdict Statute is in no way violative of the Petitioner's constitutional rights, that it is applicable in federal court diversity litigation in the State of Tennessee, and that the decision of the United States Court of Appeals for the Sixth Circuit in the case at bar was eminently correct in its ruling that the jury's general verdict should be reinstated.

IV.

## CONCLUSION.

For the reasons herein stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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